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No. 92-603

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

BEACH COMMUNICATIONS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION

DANIEL L. BRENNER
MICHAEL S. SCHOOLER
DIANE B. BURSTEIN *
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 775-3664

H. BARTOW FARR, III
PAUL M. SMITH
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

Counsel for National Cable Television Association, Inc.

* Counsel of Record

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The National Cable Television Association, Inc. (NCTA), an intervenor in the court below and a respondent in this Court, files this brief supporting reversal of the decision of the United States Court of Appeals for the District of Columbia Circuit. NCTA is the principal trade association of the cable television industry in the United States, representing the owners and operators of cable systems serving over 90 percent of the nation's 56.2 million cable households. Its members also include cable programmers, cable equipment manufacturers, and others associated with the cable industry.

STATEMENT

The sole issue in this case is the constitutionality, under the rational-basis test, of a distinction drawn by Con-

gress in the Cable Communications Policy Act of 1984 ("the Cable Act") between two types of providers of video programming. Under the Act, a "cable system" is required to obtain a local franchise, 47 U.S.C. § 541 (b)(1), and is subject to various other regulatory requirements. A "cable system" is defined as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment" that provides "cable service which includes video programming . . . to multiple subscribers within a community." *Id.* § 522(6). The Act, however, excludes from the definition a system that serves "only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management" and that does not "use[] any public right-of-way." *Ibid.* The systems falling within this exception are generally referred to as "satellite master antenna television systems" or "SMATVs."

Respondents Beach Communications, Inc. *et al.* (hereinafter "respondents") sought in this case to extend the SMATV exemption to other systems that, without using public rights-of-way, interconnect groups of apartment or condominium buildings that are not under "common ownership, control, or management." Among their claims was the argument that it was irrational, under the equal-protection component of the Fifth Amendment, for Congress to draw a distinction between otherwise similar systems based on whether the buildings involved are owned or managed in common. The D.C. Circuit ultimately agreed with this argument, holding the Cable Act unconstitutional to the extent that it adopted this distinction.

This case came to the D.C. Circuit on a petition to review an interpretation of the Cable Act by the Federal Communications Commission (the "FCC" or "Commission") that tracked the statutory language—*i.e.*, it limited the SMATV exception to systems that (1) do not use public right-of-way and (2) include only commonly

owned or managed buildings. In addition to raising equal-protection claims, respondents argued that the statute should be interpreted to exempt their systems, and they asserted a claim under the First Amendment. In its first opinion in the case, the D.C. Circuit rejected the statutory argument, holding that the FCC's interpretation was fully consistent with the Act. Pet. App. 19a-25a. The court also held that the First Amendment claim was not ripe, because no locality had yet determined what kind of regulatory requirements to impose on systems that do not use rights-of-way but still must obtain franchises under the Act. *Id.* at 25a-31a.

Turning to the equal-protection claim, the court stated that "[o]n the record before us, we fail to see a 'rational basis'" for drawing a distinction between otherwise similar systems based on whether the buildings involved are under common ownership or control. *Id.* at 34a-35a.[1] The court observed that "[t]he fact that cable television uses public rights-of-way has been the predominant rationale for local franchising," *id.* at 34a, and then stated that this rationale could not justify distinctions among video providers that did not use rights-of-way. The court found no alternative explanation in "the congressional reports and debates on the Cable Act." *Id.* at 35a. It thus announced that—even assuming that only a "conceivable basis" for the distinction was needed—it could not "imagine *any* basis for the distinction." *Ibid.* (emphasis in original).[2]

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[1] The court referred to systems connecting buildings under common ownership and control as "wholly private" systems and to systems connecting independently owned and managed buildings as "external, quasi-private" systems.

[2] The court also questioned whether there is a rational basis for a second distinction in the statute—between (1) systems that use wires to interconnect buildings under separate ownership and control and (2) systems that perform a similar function but use wireless

The court did not, however, directly vacate the FCC's interpretation of the Act. Noting that a court might "'resort to extra-record information'" or seek to obtain "'more evidence,'" *ibid.* (quoting *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)), the court found that it needed "additional 'legislative facts'" concerning the distinctions drawn by the Act, *id.* at 36a. It thus remanded the case to the Commission for it "to consider . . . whether there is some 'conceivable basis'" for those distinctions. *Ibid.*

Judge Mikva, in a separate opinion, disagreed with the majority's apparent holding that facts in the administrative record were required in order to uphold the statutory distinctions as rational. *Id.* at 40a. He identified conceivable bases for these distinctions that were sufficient, in his view, to render them constitutional. As Judge Mikva saw it, Congress could reasonably have concluded that SMATVs serving dwellings under common ownership or control are less in need of regulation than systems covering independently owned and controlled dwellings, because they are likely to be smaller and more responsive to consumers. *Id.* at 42a-43a.[3] He concurred in the remand to the FCC, however, because the Commission had not replied to the merits of respondents' equal-protection arguments, relying instead solely on the contention that they were unripe. *Id.* at 44a-45a.

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technologies to interconnect the buildings and use wires only within each building. Pet. App. 35a (referring to "internal" systems). Because the court saw no rational basis for the various distinctions in the statute, it did not address respondents' argument that these distinctions warranted heightened equal-protection scrutiny because they implicate the exercise of fundamental First Amendment rights. *Id.* at 32a.

[3] Judge Mikva also argued that it was rational to extend an exemption to systems that do not use wires to interconnect multiply owned and controlled dwellings as a means of encouraging use of new, wireless technologies. Pet. App. 41a-42a.

Following the order of remand, the FCC filed a report with the court of appeals, stating that it could not "provide additional 'legislative facts,' beyond those provided by Judge Mikva in his concurring opinion, in justification of the distinctions set forth in the Cable Act." *Id.* at 47a. The Commission stated its belief, however, "that the justifications for the challenged distinctions offered in the concurring opinion should satisfy an appropriate rational basis test." *Id.* at 52a. *See also id.* at 50a ("The Commission agrees with Judge Mikva's analysis of rational-basis review of Acts of Congress, and believes that the Court should have affirmed the Commission's decision as consistent with a reasonable line drawn in the Cable Act definition.").

The court of appeals then found to the contrary. After reviewing the report by the Commission, it said it could "conceive of no reason" for Congress to have drawn a distinction between systems that do not use public rights-of-way based on whether the dwellings they serve are under common ownership, management or control. *Id.* at 3a-4a. Although Judge Mikva had suggested that systems serving independently owned and controlled buildings might be viewed by Congress as more similar to traditional cable systems, and thus as meriting similar regulation, the court said that it "ha[d] no basis for assuming this." *Id.* at 4a. Moreover, noting that Judge Mikva had also advanced "putative justifications" for the distinction, the court pointed out that "the FCC has wholly failed to flesh these out, or to suggest some alternative rationale." *Ibid.* It thus concluded that the rationale of "similarity" was nothing more than "a naked intuition, unsupported by conceivable facts or policies." *Ibid.*[4]

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[4] The court held that the appropriate remedy, to eliminate the distinction found to be irrational, was to exempt from the franchising requirement those systems serving separately owned and controlled dwellings (and not using public rights-of-way), rather than to extend the franchising requirement to all SMATVs. *Id.* at

(majority is "unable to imagine *any* basis for the distinction"). 25 (majority remands record for FCC to consider "whether there is some 'conceivable basis' " for the distinction).

The Commission agrees with Judge Mikva's analysis of rational-basis review of Acts of Congress, and believes that the Court should have affirmed the Commission's decision as consistent with a reasonable line drawn in the Cable Act definition. *See* concurring statement at 1-4. It appears that the majority in this case has a different view, however. And the majority apparently already has rejected the considerations, grounded in the Cable Act, that were put forward in the concurring opinion. From its review, after remand, of the relevant legislative history and of its own policy preferences, the Commission is unaware of any desirable policy or other considerations—beyond those suggested by Judge Mikva in his concurring opinion—that would support the challenged distinctions. Moreover, as noted earlier, even if the majority were to accept some or all of such considerations as a "rational basis" justification for some of the distinctions involved in this case, the majority opinion indicates that other equal protection questions then would arise—questions whose resolution might result in substantially broader regulation of video delivery systems than either the Commission or, in our view, Congress ever intended. *See* slip opinion at 21-22 & n. 17.

As the Court may recall,[3] the Commission in an earlier interpretation of the cable definition had taken the position that, when multiple unit dwellings are involved, a facility's use of the public right-of-way should be the sole basis for determining the facility's

[3] *See* FCC Brief, pp. 3-6.

status as a cable system and therefore its susceptibility to local franchise regulation.[4] Under that interpretation, which reflected the Commission's own policy preference, none of the facilities under consideration here would have been subject to franchise regulation under the Cable Act. When this earlier interpretation subsequently was rejected by a federal district court as "contraven[ing] unambiguous Congressional intent,"[5] the Commission reconsidered its earlier position.

Reexamining the statute, the Commission concluded —and this Court has agreed—that the plain language of the statute does not exempt facilities serving multiple unit dwellings from cable regulation unless (1) the dwellings are under "common ownership, control or management" and (2) no use is made of the public right-of-way. The Commission's current interpretation of the cable definition, which results in the regulatory distinctions that are challenged on equal protection grounds, was dictated by the unambiguous language of the statute, and not by any policy determination by the FCC in support of that interpretation.

The Court should be aware that significant cable legislation is before Congres now, *see, e.g.*, H.R. 4850, 102d Cong., 2d Sess. (1992), and that Congress in the context of considering that legislation will have an opportunity to revise the definitional provisions of the 1984 Act if it chooses. Some interested parties have brought the Court's decision in this case to the atten-

[4] *Cable Communications Act Rules*, 58 Rad. Reg. 2d (P&F) 1, *modified*, 104 FCC 2d 386 (1986), *aff'd in part and rev'd in part, American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

[5] *City of Fargo v. Prime Time Entertainment, Inc.*, No. A3-87-47, slip opinion at 9 (D.N.D., March 28, 1988) (Appendix A to FCC Brief).

tion of the relevant committees and have suggested legislative language to address the equal protection question identified in the majority opinion in this case.

CONCLUSION

The Commission believes that the justifications for the challenged distinctions offered in the concurring opinion should satisfy an appropriate rational basis test. The Commission's further review of the Cable Act's purposes, however, has suggested no additional and meritorious policy considerations that might justify those distinctions. Moreover, as we have pointed out, any policy considerations the Commission might be able to add at this time might have the anomalous result of extending regulation to facilities that neither the Commission nor, in our view, Congress intended it to reach as a matter of policy. In these circumstances, the Commission respectfully declines to offer additional "legislative facts" that might enable the Court to resolve the initial equal protection question it has identified.

Respectfully submitted,

ROBERT L. PETTIT
General Counsel

JOHN E. INGLE
Deputy Associate General Counsel

ROBERTA L. COOK
Counsel

FEDERAL COMMUNICATIONS
COMMISSION
1919 M Street N.W.
Washington, D.C. 20554
(202) 632-7112

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